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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID F. SUEN,

Defendant and Appellant.

B149734

(Los Angeles County
Super. Ct. No. BA198686)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Terry Green, Judge. Reversed.

Dennis A. Fischer and John M. Bishop for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General and Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

About an hour before he was shot and killed, Ken Fung wrote a note stating, “I got kill [*sic*] because David Suen, he wanted to kill me” (Note). This case requires us to consider whether admission of the Note was proper under the spontaneous statement, (Evid. Code § 1240), or threat of infliction of injury, (Evid. Code § 1370), exception to the hearsay rule. We conclude that the Note does not fall within either hearsay exception and its admission was error. The judgment of conviction is reversed.

PROCEDURAL BACKGROUND

On July 27, 2000, by information, appellant David Suen was charged with first degree murder in violation of Penal Code section 187, subdivision (a). It was further alleged that Suen personally and intentionally discharged a firearm, which caused great bodily injury in violation of Penal Code section 12022.53, subdivisions (d) and (g).

Prior to trial, Suen moved in limine to exclude the Note written and signed by Fung, which stated: “I got kill [*sic*] because David Suen he wanted to kill me.” The Note was dated December 29, 1999 and the time, 6:36 p.m., was recorded.

The prosecution opposed the motion to exclude the Note, arguing the Note was admissible as an exception to the hearsay rule both as a spontaneous statement under Evidence Code¹ section 1240 and as a threat of infliction of injury under section 1370. The prosecutor argued, “Fung had every reason to want his murderer to be brought to justice and no reason to implicate an innocent person[]” and that “Fung wrote the note at about the time when phone records show a call from David Suen.” The prosecutor further asserted that the Note was not a “joke” because Fung wrote it to advise law enforcement, wanted it to be taken seriously, and was “more than likely right” about his killer because he was aware of his impending death.”

The trial court concluded that the Note fell within the ambit of both section 1240 (spontaneous statement) and section 1370 (threat of infliction of injury). The trial court

¹ Unless otherwise indicated, all further statutory citations are to this Code.

reasoned as follows: “I’m going to admit this, despite the fact that I have reservations of any kind of statement like this where you’re getting in a very lethal piece of evidence without the ability to examine the declarant, I can think of no reason why Mr. Fung would write a note like this, unless he honestly believed he was about to be killed and wanted for posterity the police to know who did it. [¶] He certainly, if he believed he was going to be killed, would have no reason to name Mr. Suen if Mr. Suen was innocent. What would the motive be to let your murderer go free, and an innocent man get punished?” The court found evidence that Suen spoke to Fung “contemporaneous[ly]” with Fung’s writing the Note and stated that Fung’s sister would “apparently” testify to the “excitement of the moment.” The court also relied on the fact that Fung was killed approximately one hour after he wrote the Note.

The Note was admitted into evidence. The prosecutor argued to the jury as follows: “Let’s answer this question: How do we know that David Suen shot Ken Fung? We know it because of the note. We know it because of the note.” The prosecutor also argued to the jury, “I know who this note was for. It’s for you. He was writing the note to you. . . . to the people who would be in charge of bringing his killer to justice.”

The jury convicted Suen of first-degree murder. The jury further found that Suen personally and intentionally discharged a handgun in violation of Penal Code section 12022.53, subdivision (d). Suen was sentenced to 50 years to life in state prison, ordered to pay a restitution fine, and ordered to pay a parole restitution fine. The latter order was stayed pending successful completion of parole. Suen was awarded 427 days custody credit. He timely appealed.

FACTUAL BACKGROUND

On December 29, 1999, at approximately 5:00 p.m. to 6:00 p.m., Fung called Jimmy Luong and asked Luong to go to Chinatown.² Fung told Luong “there’s problems with some guys” and mentioned that he was “in trouble.”

That same evening, at approximately 6:05 to 6:25 p.m., Fung called his sister to ask her how to use a computer. Fung’s sister, Joanne, was interrupted with another phone call. When she returned to the line with Fung, Joanne overheard him speaking to someone else, and she overheard Fung repeating the “F word” for about 15 to 20 seconds. Fung sounded “pretty upset.” After repeating the “F word,” Fung returned to his conversation with his sister and spoke in “a normal voice.” When Joanne asked Fung to whom he was speaking, Fung answered that he was speaking with a friend, but did not identify the friend.

That same evening, Fung received two phone calls from the Suen residence on a cell phone that Fung’s sister had given him. One was at 6:16 p.m. and the other was at 6:24 p.m.

Sometime between 7:30 and midnight, Fung was shot six times near a parking lot in Chinatown. Fourteen casings from a nine-millimeter semiautomatic weapon were found near a car Fung had been driving. Four bullets were also found. Fung died of multiple gunshot wounds.

Several witnesses saw a person leave the scene of the shooting. Mike Nhim testified that the man walking away from the scene was wearing a big black jacket that looked like a ski jacket and was wearing a beanie on his head. According to Nhim, the man leaving the scene wore either blue or black jeans. He was about 5 feet 8 inches and was skinny or muscular. Nhim did not see the man’s face. Nhim estimated that the man leaving the scene was in his early twenties based on the way he dressed and his height.

² This statement was not admitted for the truth of the matter asserted, but to show that the words were said. Luong also testified that he could not remember the precise time of the phone call.

Francis Manlutac was near the shooting and witnessed a light-skinned person leaving the scene wearing a black beanie and a black jacket, but could not determine if the person was male or female. Troy Anderson saw a man who was about 5 feet 7 inches or 5 feet 8 inches, slim or with a medium build, in dark clothing leave the scene.

At Fung's request, Luong went to Chinatown. But when he arrived, Fung had already been shot.

The next day police officers searched Fung's bedroom and found the Note. Fung never had written a similar note.

Police officers subsequently searched Suen's room and found two jackets and two beanie caps, similar to the one worn by the person leaving the scene of Fung's shooting. Neither beanie cap contained gunshot residue. One of Suen's black jackets contained gunshot residue, but Nhim testified that this jacket did not resemble the one worn by the man leaving the scene of Fung's shooting. Another jacket was found in Suen's closet. That jacket was identified by Nhim as resembling the one worn by the person leaving the scene, but did not contain gunshot residue. A dark blue pair of pants containing gunshot residue also was found in Suen's closet.

Suen was arrested on February 8, 2000. Suen was approximately 5 feet 6 or 7 inches and weighed approximately 150 to 160 pounds. While in prison, Suen had a conversation with his mother and asked her to state he left for San Francisco on December 27th and "[o]ur story should all be the same, it was the 27th. . . ." When his mother indicated that she believed Suen departed on the 28th, Suen replied, "Just say 27. If you say 28 and we say 27, how can it be like that?" Eventually, Suen's mother agreed to say the 27th, stating, "let it be the 27th then."

DISCUSSION

Suen contends:

(1) that the trial court erred in admitting the Note because the Note, which was admitted for the truth of the matter asserted, did not fall within either the spontaneous statement or threat of infliction of injury exception to the hearsay rule.

(2) that the admission of the Note violated his rights under the Confrontation Clause of the Sixth Amendment.

The Attorney General responds:

(1) that the trial court acted within its discretion in admitting the Note as a spontaneous statement and as an explanation of a threat.

(2) that admission of the Note did not violate Suen's rights under the Confrontation Clause.

We conclude the Note was not admissible under either the spontaneous statement or threat of infliction of injury exception to the hearsay rule. We review these evidentiary issues for abuse of discretion. (*People v. Roybal* (1998) 19 Cal.4th 481, 516; *People v. Gallego* (1990) 52 Cal.3d 115, 175; *People v. Poggi* (1988) 45 Cal.3d 306, 318.)³ In addition, as we discuss, we find that admission of the Note was prejudicial. Because we hold that the Note should have been excluded, we need not and do not consider whether admission of the Note violated Suen's rights under the Confrontation Clause of the Sixth Amendment.

I. Section 1240

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or

³ Suen argues that this low level of scrutiny ignores the integral link between the foundational elements of a spontaneous statement and trustworthiness for purposes of the Confrontation Clause as a finding of trustworthiness is automatic once the foundational elements are proven. For support, Suen relies on our Supreme Court's recent opinion in *People v. Cromer* (2001) 24 Cal.4th 889, 900, in which the court unanimously found that de novo review was required for questions regarding whether conduct amounts to diligence in securing the presence of a witness at trial as that term is used in section 1291. (*Ibid.*) We need not decide whether the reasoning of *Cromer* is inconsistent with the abuse of discretion standard for issues other than the diligence of procuring a witness at trial. Nor are we required to contemplate our burden under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 because, in this case, there is no evidence to satisfy the foundational requirements for a spontaneous statement regardless of the level of scrutiny we apply.

explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.” To render a statement admissible under the spontaneous statement exception, the following foundational elements must be established: (1) an occurrence must be sufficiently startling to produce nervous excitement; (2) the statement must be made before there was time for contrivance and misrepresentation; and (3) the statement must relate to the circumstances of the occurrence preceding it. (*People v. Poggi, supra*, 45 Cal.3d at p. 318.)

These foundational prerequisites assure the trustworthiness of a spontaneous statement even though the statement is made out of court and absent the protection of an oath. “[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker’s actual impressions and belief.” (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on another ground in *People v. Waidla* (2000) 724, fn. 6.) “Excitement as used in the statute includes both “psychic stress caused by *observing* an event,” and “physical stress or pain” experienced by [the declarant].” (*People v. Farmer, supra*, 47 Cal.3d at p. 901 fn. 1.)

We begin our analysis of whether the Note constituted a spontaneous statement with the first foundational requirement -- whether there was an occurrence sufficiently startling to produce nervous excitement. The Attorney General argues that “Fung wrote the note while he was under the stress of excitement caused by *the death threat*[,]” an argument predicated on the existence of a death threat. (Emphasis added.) While there is no dispute that a death threat would cause psychic stress, whether Suen threatened Fung (in any manner) is disputed. As evidence of the “death threat” the Attorney General relies on (1) two phone calls from the Suen residence to Fung shortly before Fung wrote the Note; (2) the Note itself; and (3) Fung’s conversation with Luong. We consider each *seriatim*.

A. *Suen's Phone Calls To Fung Are Not Evidence Of A Death Threat*

On December 29, 1999, Fung received two phone calls from Suen, one at 6:16 p.m. and the other at 6:24 p.m.⁴ Between 6:05 p.m. and 6:25 p.m., Fung called his sister for instructions on using a computer. During the course of the latter conversation, Fung's sister overheard Fung repeat the "F word" for approximately 15 to 20 seconds, at which time Fung sounded upset. This evidence demonstrates, at most, that Fung received a phone call from Suen that upset him and caused him to utter the "F word." Without information regarding the content of the communication or the circumstances surrounding the phone call, it is impossible to conclude either that Suen threatened Fung or that Fung's outburst necessarily was the result of a threat.

This case is similar to *People v. Pearch* (1991) 229 Cal.App.3d 1282, which involved a phone call made by the victim of a shooting, Flores. During the course of the telephone conversation Flores told his brother that he was being hurt, sounded nervous, and requested to borrow \$5000. (*Id.* at p. 1288.) Additional evidence showed that Flores was bruised on one side of his right eye. (*Ibid.*) The trial court concluded that the telephone call was "staged" by the defendants to obtain money from Flores' brother and that it was possible Flores was "threatened," or "beaten" or even had had "a gun held on him." (*Id.* at p. 1290.) The trial court identified the startling event as "'maybe holding him against his will, false imprisonment, or perhaps an assault with some sort of weapon, or perhaps assault with fists or something that left the marks on the face.'" (*Ibid.*) Upon review, the *Pearch* court concluded that admission of Flores's statements under the spontaneous statement exception to the hearsay rule was error because, in part, there was no *evidence* of a startling event; there was only *speculation*. (*Ibid.*)

Just as Flores may have been threatened by his kidnappers and may have uttered his statements in response to that threat, Fung may have been threatened by Suen and

⁴ The record shows only that the phone calls were from the Suen residence to a cell phone in Fung's possession. However, interpreting all facts in favor of the judgment, as we

may have written the Note under the stress of the excitement of that threat. The theory that Suen threatened Fung during one or both phone calls certainly is plausible. A plausible theory, however, is not *evidence* of a startling event.

Without evidence of a startling event, the antecedent condition to admitting a statement under the spontaneous statement exception to the hearsay rule is not satisfied. In contrast to *evidence* of a startling event, a plausible theory fails to assure the trustworthiness of the spontaneous statement. Dispensing with the requirement of evidence of a startling event and adopting a less exacting standard would negate the sole basis to conclude that the statements constitute the uninhibited expression of the speaker's actual impressions and beliefs.

B. The Note Is Not Evidence Of A Death Threat

The Attorney General argues that the Note itself demonstrates that Suen threatened Fung: "Fung perceived a death threat, and he expressed that threat in the note as if it were a certainty." The Attorney General also asserts that "[w]hile Fung's note may not have been written in proper English or in detail, it nevertheless conveyed a threat." (Footnote omitted.)

The Note, written in English and in the past tense, states only "I got kill [*sic*] because David Suen, he wanted to kill me." The Note contains no express reference to a threat. It does not mention that Suen (or anyone else) threatened Fung. Consequently, the assertion that the Note conveyed a threat is inaccurate. The plain language only identifies the killer. A homicide may, but does not necessarily, include a threat. It follows that the express language of the Note cannot serve as a basis for finding Suen threatened Fung. The Note simply contains no mention of a threat.

In concluding that the Note was admissible, the trial court did not rely on the express language of the Note, but instead assumed that Fung would not have written the Note unless he believed Suen planned to kill him, an argument repeated by the Attorney

must (*People v. Barnes* (1986) 42 Cal.3d 284, 303), this evidence is sufficient to show Suen called Fung.

General. The trial court stated, “I can think of no reason why Mr. Fung would write a note like this, unless he honestly believed he was about to be killed and wanted for posterity the police to know who did it.”

The trial court’s reasoning circumvents the foundational requirement for a spontaneous statement by assuming Fung’s statement must have been the product of a startling event without requiring *evidence* to support that assumption. The tautological reasoning relies on an assumption of Fung’s mental state based on the statement itself rather than on evidence of the circumstances surrounding the making of the statement. By speculating that the statement could only be written under a specific circumstance – Fung’s “honest[] belie[f] he was about to be killed” -- the trial court simply never asked the critical question: what evidence is there of a startling event. It never determined whether the Note was a product of nervous excitement caused by a startling event.

The assumption that Fung would not have written the Note absent a death threat is unsupportable. One can imagine a variety of reasons Fung may have written the Note including a retaliation, an initiation, a framing, a response to an ultimatum, or as the prosecutor raised in his argument, a joke. Admittedly, none of these possibilities (or the countless others one could imagine) is more probable than a finding that the Note was written because Suen threatened Fung. But absent additional evidence, none of these possibilities is less probable. Each simply is speculation.

People v. Feliz (2001) 92 Cal.App.4th 905, 912 underscores the importance of distinguishing speculation from evidence. *People v. Feliz* involved a prosecution for making terrorist threats. Threats were made to the defendant’s psychologist, who telephoned the victim. (*Id.* at p. 908.) After receiving a phone call from the psychologist, the victim said, ““Oh, my God, he’s going to try to kill me.”” The prosecutor argued the victim’s statement indicated that the psychologist had revealed the content of the threats during the phone conversation. (*Id.* at p. 912.) The court rejected the argument, reasoning that the psychologist could have caused the same reaction in the victim by warning the victim that the defendant was dangerous rather than revealing a

specific death threat. (*Ibid.*) “[T]here must be evidence to support an inference and the prosecution may not fill an evidentiary gap with speculation.” (*Ibid.*)

Here, the lack of any evidence that Suen threatened Fung was filled with the trial court’s speculation as to why Fung wrote the Note. Speculation of a startling event, without evidence of that startling event, does not satisfy the spontaneous statement exception to the hearsay rule.

C. Fung’s Phone Call To Luong Does Not Show The Existence Of A Death Threat

Finally, the Attorney General argues that “[i]f Fung was not under the stress of such a [death] threat, he would not have placed a telephone call to Luong saying he needed help.” We do not agree.

The fact that Fung called Luong and indicated that he was “in trouble,” does not establish that Suen threatened Fung.⁵ First, this evidence neither expressly nor implicitly refers to Suen. Fung could be “in trouble” for different reasons that do not involve Suen. Second, this evidence does not refer to any specific threat, and therefore does not ineluctably lead to the conclusion that Fung was threatened by anyone, let alone by Suen. Third, Luong’s testimony suggests that Fung already knew he was “in trouble” before he received the phone calls from Suen, undermining the claim that Suen threatened Fung. Specifically, Luong testified that, although he did not remember the precise time, Fung probably called at approximately 5:00 or 6:00 p.m., to the extent he remembered. Luong’s testimony, if credited, indicates that Fung had determined he was in trouble around 5:00 or 6:00 p.m., before he received the phone calls from Suen at 6:16 p.m. and 6:24 p.m.

The record in this case fails to show that Suen threatened Fung, the sole startling event identified by the Attorney General as a basis for admission of the Note. Without

⁵ The evidence of this phone call was not admitted for the truth of the matter asserted. This evidence was not presented to the trial court at the time the court decided to admit the Note as a spontaneous statement.

evidence of a startling event, there is no basis to conclude the Note was a spontaneous statement or to deem it trustworthy. In short, speculation that Suen might have threatened Fung is insufficient to establish the necessary foundation to admit a statement under the spontaneous statement exception to the hearsay rule.⁶

II. Section 1370

In addition to finding that the foundational elements for a spontaneous statement had been met, the trial court concluded that the foundational elements of the hearsay exception for threat of infliction of injury were satisfied. That exception requires, *inter alia*, that “[t]he statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.” (§ 1370, subd. (a)(1).)

As we explain, the Note does not purport to narrate, describe, or explain either (1) the infliction of physical injury or (2) the threat of physical injury. The Note, therefore, fails to satisfy the threshold requirement of section 1370.

A. Infliction of Injury

The Note does not purport to describe the infliction of injury because it describes only a future event, i.e. the future killing of Fung. It is undisputed that, at the time Fung wrote the Note, he was uninjured. To fall within the ambit of the first prong of section 1370 – a description of the infliction of physical injury – the description must relate to a past infliction of physical injury.

We read statutes as a whole, giving effect to all their provisions, neither reading one section to contradict others or its overall purpose, nor reading the whole scheme to nullify one section. (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 [“[a]ll parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others. [Citations.]”].) To give meaning to the phrase infliction of physical injury it must connote something different from the phrase threat of physical injury. The infliction of

⁶ Our conclusion that the first foundational element of a spontaneous statement was not established negates the need to further consider the additional foundational elements.

physical injury is distinguishable from a threat of physical injury because whereas a threat involves a future event, the infliction of injury involves a past event. Additionally, in order to constitute something more than mere speculation and something more than the possibility of future harm, the infliction of injury must describe a past occurrence.

In short, the Note does not describe the past infliction of physical injury. The parties do not argue otherwise.

B. Threat of Injury

The parties vigorously dispute whether the Note describes the threat of physical injury. According to the Attorney General, “the Note explained that appellant threatened to kill Fung.” According to Suen, “Fung’s note did not even mention a ‘threat,’ much less did it ‘narrate, describe, or explain’ one.”

We agree with Suen. As we previously have discussed, the Note does not refer to any threat. It may have been written following a threat, but that assertion is only one of many possibilities. The Note does not narrate, describe, or explain a threat as those terms are commonly understood. (See *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [“Courts should give statutory words their plain or literal meaning unless that meaning is inconsistent with the legislative intent apparent in the statute.”].) Narrate means “to tell or recite the happenings of a story” (Webster’s 3d Internat. Dict. (1993) p. 1503.) The Note does not tell the happenings of a story about a threat. Describe means “to represent [a personal observation, mental image, impression or understanding] by words written or spoken for the knowledge or understanding of others” (*Id.* at p. 610.) The Note does not use written or spoken words to represent or tell a threat. Explain means “to make manifest . . . present in detail . . . make plain or understandable.” (*Id.* at p. 801.) The Note does not present a threat in detail or make it plain or understandable. Consequently, the Note does not satisfy the threshold requirement of section 1370 and admission of the Note under section 1370 was improper.

III. Prejudice

Admission of the Note was prejudicial. (*People v. Duarte* (2000) 24 Cal.4th 603, 618-619; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The only issue in this case was identity. As the prosecutor argued to the jury, “The only question you have to decide is . . . who . . .” The Note was the centerpiece of the prosecutor’s argument to the jury that it should answer that question by finding Suen shot Fung. Specifically, the prosecutor argued: “Let’s answer this question: How do we know that David Suen shot Ken Fung? We know it because of the note.” The prosecutor even argued that Fung wrote the Note to assist the jury in “bringing his killer to justice.” As this argument demonstrates, the note was fundamental to the prosecution and, consequently, absent its admission, there is a reasonable probability the outcome of the trial would have been more favorable to Suen.

DISPOSITION

The judgment is reversed.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.